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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, JOHN STURDIVANT, GLEN PETERSON, HARRY DAWSON, JERRY BLACK, ALEJANDRO GONZALES,
Petitioners,

v.

RAMIRO MARTINEZ,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court below improperly departed from the rule established by this Court, and adopted by the overwhelming majority of circuit and state courts, that the Civil Service Reform Act provides the exclusive remedial scheme for federal employee claims arising under the Act?

PARTY TO THE PROCEEDINGS

In addition to the parties named in the caption, Robert M. Guttman, as Assistant Secretary for Labor-Management Standards, United States Department of Labor, was Intervenor-Appellee in the court of appeals, and Intervenor-Defendant in the district court proceedings.

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PETITION FOR A WRIT OF CERTIORARI

The American Federation of Government Employees, AFL-CIO, ("AFGE"), John Sturdivant, Glen Peterson, Harry Dawson, Jerry Black, and Alejandro Gonzales petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 980 F.2d 2039. The opinion of the district court is set forth at App., *infra*, 9a-13a.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1993. This petition for a writ of certiorari was filed on April 12, 1993, within 90 days of the date of the entry of judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. Relevant provisions of the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111 (1978) ("CSRA" or "Act"), codified throughout title 5 of the U.S. Code, are contained in Title VII, known as the Federal Service Labor-Management Relations Statute ("FSLMRS"), 5 U.S.C. § 7101 *et seq.* 5 U.S.C. § 7120 mandates that labor organizations in the federal sector establish standards of conduct providing for

> (1) the maintenance of democratic procedures and practices including provisions for periodic elections to be conducted subject to recognized safeguards and provisions defining and securing the right of individual members to participate in the affairs of the organization, to receive fair and equal treatment under the governing rules of the organization, and to receive fair process in disciplinary proceedings. . . .

5 U.S.C. § 7120(a)(1). 5 U.S.C. § 7120(d) goes on to state that

> (d) The Assistant Secretary [of Labor] shall prescribe such regulations as are necessary to carry out the purposes of this section . . . . Complaints of violations of this section shall be filed with the Assistant Secretary. In any matter arising under this section, the Assistant Secretary may require a labor organization to cease and desist from violating this section and require it to take such actions as he considers appropriate to carry out the policies of this section.

2. The Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 *et seq.* ("LMRDA") provides in relevant part:

> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined . . . unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

29 U.S.C. § 411(a)(5). 29 U.S.C. § 412 states that

> [a]ny person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States. . . .

STATEMENT OF THE CASE

This case involves a federal sector labor dispute arising out of misconduct by, and irregularities in the election of, a federal employee local president. At the time of this action, Ramiro Martinez was a civilian employee of the United States Department of the Air Force at Kelly Air Force Base in San Antonio, Texas. He was also president of AFGE Local 1617, the exclusive representative for federal employees in recognized bargaining units at Kelly. App., *infra*, 2a. The bargaining units represented by Local 1617 consist entirely of federal employees. *Id.* Local 1617 is chartered by AFGE, a federation composed of over one thousand local labor organizations representing some 700,000 federal employees. *Id.*

On January 3, 1989, AFGE National Vice President Glen Peterson ordered an investigation of allegations that Martinez sold a list of names and addresses of Local 1617 members to an insurance company. App., *infra*, 3a. Pursuant to this investigation, AFGE National President John Sturdivant found probable cause to believe that Martinez had violated the local and national constitutions and therefore initiated disciplinary proceedings against him. *Id.* Believing that the local could not conduct a fair and impartial trial of these charges, Sturdivant appointed a trial committee composed of other union officers having no affiliation with Local 1617: Harry Dawson, Jerry Black, and Alejandro Gonzales. *Id.*

After a hearing at which Martinez was represented by counsel and permitted to present evidence on his behalf (Record on appeal ("R.") 49, 692-694), the trial committee concluded that Martinez improperly sold the membership list. App., *infra*, 3a. It recommended that Sturdivant remove him as local president and bar him from holding union office for a period of three years. *Id.* Adopting the committee's decision, Sturdivant notified Martinez on August 24, 1989, that the removal and bar would be effective immediately. *Id.* Martinez did not appeal this decision through the procedures available to him under the AFGE National Constitution (R. 697).

While the union was conducting its investigation of Martinez' misconduct, Local 1617 held its election at which Martinez was reelected local president. App., *infra*, 3a. Six unsuccessful candidates for office subsequently filed an election protest with Local 1617's election committee alleging, *inter alia*, that they were denied access to the Local's newspaper while other candidates were accorded such coverage. *Id.* The committee dismissed the protest. *Id.* Two of the protesters appealed the dismissal to NVP Peterson who ordered an investigation. *Id.* The probe revealed that the incumbent officers, including Martinez, improperly used local funds to promote their election. In response to these findings, Peterson ordered a new election. *Id.* After unsuccessfully appealing the decision to Sturdivant, Martinez challenged the election ruling before the Department of Labor. *Id.* After conducting its own investigation, the Labor Department dismissed his complaint. App., *infra*, 4a. Martinez appealed the dismissal to the Assistant Secretary for Labor-Management Standards, who after careful review, upheld the dismissal. App., *infra*, 10a.

2. Proceedings Below

In September 1989, while his complaint was still pending before the Labor Department, Martinez filed suit in

federal district court against AFGE, John Sturdivant, Glen Peterson and the three members of the trial committee, alleging impropriety in the disciplinary and election proceedings. App., *infra*, 4a. The defendants quickly moved to dismiss the case for lack of subject matter jurisdiction on the grounds that the CSRA provided the exclusive remedy for Martinez' claims. The district court agreed. App., *infra*, 13a.

On appeal, however, the Fifth Circuit refused to consider whether the CSRA's comprehensive remedial scheme applied to, much less governed, Martinez' cause of action. App., *infra*, 5a. Despite the fact that this case involves a federal employee's conduct as president of a purely federal sector local, the court of appeals held that "the only question before us is whether the LMRDA grants subject matter jurisdiction" and "not whether the CSRA provides a remedy." *Id.*, fn.2. It thereafter remanded [1] the case for further proceedings on the question of AFGE's status as a "mixed union," i.e., one representing both public and private sector employees, to determine whether Martinez could maintain his action in federal district court under the LMRDA. App., *infra*, 7a-8a.

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[1] That the decision at bar involves a remand should not deter the Court from granting this petition. The jurisdictional issue here has broad ramifications for the integrity of the statutory remedies for federal employment claims. Previously, the Court has granted certiorari to review similar judgments remanding a case for trial when it involves an important question of law that is fundamental to the further conduct of the case and would otherwise qualify as a basis for certiorari. *See United States v. General Motors Corporation*, 323 U.S. 373, 377 (1945); *Gillespie v. United States Steel Corporation*, 379 U.S. 148, 153 (1964). Specifically, it has consented to review decisions raising significant jurisdictional questions, such as here, when the court of appeals had reversed the granting of a motion to dismiss and ordered the case remanded for trial. *See Land v. Dollar*, 330 U.S. 731, 734, n.2 (1947); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685, n.3, *reh'g denied*, 330 U.S. 840 (1949).

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the exclusivity of the remedies prescribed by Congress in the Civil Service Reform Act. The Act represents a carefully designed congressional effort to provide a comprehensive mechanism for resolving federal sector labor disputes. The Fifth Circuit's refusal to resolve the labor dispute at issue here within this statutory framework is at odds with the clear precedent of this Court and conflicts with the approach adopted by nearly every other circuit addressing similar federal employee claims. Moreover, by allowing federal employees to bring their labor related claims into district court, the court of appeals has seriously subverted the statutory scheme for resolution of such disputes. Review by this Court is therefore warranted.

1. The Civil Service Reform Act of 1978 "comprehensively overhauled the civil service system." *Lindahl v. OPM*, 470 U.S. 768, 773 (1985). Its leading purpose was "to replace the haphazard arrangements for administrative and judicial review" of federal employment matters with an "integrated scheme" of review. *United States v. Fausto*, 484 U.S. 439, 445-446, *reh'g denied*, 485 U.S. 972 (1988). Title VII of the CSRA is an important part of this highly complex and subtle statutory scheme of federal personnel management. Indeed, it is the "controlling authority" for labor relations in the federal government. *Karahalios v. National Federation of Federal Employees Local 1263*, —— U.S. ——, 109 S.Ct. 1282, 1285 (1989). Consequently, a court should look to these controlling provisions in the first instance when a federal employee brings the type of labor-related claims alleged here.

It is beyond dispute that Martinez' claims come within the scope of the CSRA. As a civilian employee of the Air Force, Martinez was an "employee" within the meaning of 5 U.S.C. § 7103(a)(2) whose "rights and obligations,"

vis-a-vis collective bargaining and organized labor, Congress ordained through enactment of Title VII. 5 U.S.C. § 7101(b). The allegations of impropriety in the union's disciplinary proceedings and decision to set-aside the local's election fall squarely within the scope of 5 U.S.C. § 7120. That provision establishes standards of conduct for labor organizations,[2] requiring that they conduct fair elections, protect a member's right to participate in their affairs, and ensure fair disciplinary proceedings. The remedy for violations of the standards of conduct is set forth in § 7120(d), which provides that complaints alleging such violations shall be filed with the Assistant Secretary. 5 U.S.C. § 7120(d).

Alternatively, Martinez' claims could be characterized as stating violations of his right under 5 U.S.C. § 7102 "to form, join, or assist any labor organization . . . freely and without fear of penalty or reprisal [including] the right to act for a labor organization in the capacity of representative." The Act makes it an unfair labor practice for a union to interfere with an employee's exercise of his rights under the chapter, or otherwise fail or refuse to comply with any of its provisions. 5 U.S.C. § 7116(b)(1) and (8). Thus, he could have brought such charges to the Federal Labor Relations Authority ("FLRA") which possesses exclusive jurisdiction over unfair labor practices. 5 U.S.C. § 7118. *See Karahalios v. NFFE, Local 1263*, *supra*, 109 S.Ct. at 1287.

2. The most persistent object of this Court's attention with regard to the CSRA is the exclusivity of its comprehensive remedial scheme. In *Bush v. Lucas*, 462 U.S. 367 (1983), a federal employee instituted a *Bivens* action against his supervisor for violation of his First

[2] Both AFGE, AFL-CIO and Local 1617 are "labor organizations" within the meaning of the Act which defines that term as "an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievance and conditions of employment, ..." 5 U.S.C. § 7103(a)(4).

Amendment rights. The Court faced for the first time the question whether the "elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue." Finding the comprehensive nature of the statutory remedies to be a "special factor counselling hesitation," the Court refused to create a judicial remedy for the constitutional violation. *Id.*

This Court's adherence to the principle of exclusivity was again demonstrated in *United States v. Fausto*, *supra*, 484 U.S. at 443-45, where it addressed the question of whether a previous means of obtaining judicial review of federal personnel actions under the Tucker Act, 28 U.S.C. § 1491, was still viable under the CSRA. The Court held that the CSRA's "integrated scheme of administrative and judicial review" foreclosed Claims Court review of federal personnel actions pursuant to its jursidiction under the Tucker Act to hear Back Pay Act claims.

More recently, the Court held that a federal employee could not sue his union for breach of the duty of fair representation. *Karahalios v. NFFE, Local 1263*, *supra*, 109 S.Ct. 1282. Refusing to imply a private cause of action from the fair representation provision at 5 U.S.C. § 7114(a)(1), the Court noted that " '. . . where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies.' " *Id.* at 1286 [citation omitted]. Absent " 'strong indicia of contrary congressional intent,' " it would conclude " 'that Congress provided precisely the remedies it considered appropriate.' " *Id.* [citation omitted]. Since the duty of fair representation was "expressly recognized in the Act, and an administrative remedy for its breach [] expressly provided for before the FLRA. . . ," a federal employee had no private cause of action to enforce it. *Id.* at 1287. The Court believed that holding otherwise "would seriously undermine [] the congressional scheme. . . ." *Id.* at 1288.

3. This Court's steadfast commitment to the CSRA's remedial scheme has led one jurist to characterize it as "jealously guard[ing] the CSRA against inconcinnous judicial incursions." *Montplaisir v. Leighton*, 875 F.2d 1, 3 (1st Cir. 1989). Its unwavering focus on the CSRA's regulatory mechanism has led to the overwhelming consensus among the circuits that the CSRA's legislative purpose "was to channel grievances and disputes arising out of government employment into a single system of administrative procedures and remedies." *Rivera v. United States*, 924 F.2d 948, 951 (9th Cir. 1991). Thus, in "a variety of settings, they have followed the Court's lead and treated [the] CSRA as establishing the sole mechanism for resolving labor conflicts in the federal arena." *Montplaisir, supra*, 875 F.2d at 3.[3]

For instance, eleven circuits have held that the CSRA precludes jurisdiction over constitutional tort claims brought by federal employees involving job-related matters. *See Pinar v. Dole*, 747 F.2d 899, 909 (4th Cir. 1984) *cert. denied*, 471 U.S. 1016 (1985); *Rollins v. Marsh*, 937 F.2d 134, 139 (5th Cir. 1991); *Jones v. Tennessee Valley Authority*, 948 F.2d 258, 262-64 (6th Cir. 1991); *Feit v. Ward*, 886 F.2d 848, 854-56 (7th Cir. 1989); *McIntosh v. Turner*, 861 F.2d 524, 525 (8th Cir. 1988); *Saul v. United States*, 928 F.2d 829, 836-840 (9th Cir. 1991); *Petrini v. Howard*, 918 F.2d 1482, 1484 (10th

[3] Similarly, state courts have refused to exercise jurisdiction over federal labor relations matters. In *Ramos v. AFGE*, 693 S.W.2d 485 (Tx. 1985), the court refused to entertain a complaint by Local 1617 challenging AFGE's imposition of trusteeship under 5 U.S.C. § 7120 on the grounds that Congress entrusted exclusive jurisdiction over such matters to the Assistant Secretary. The highest courts in three states have held that the statutory unfair labor practice procedures for remedying a breach of the duty of fair representation under 5 U.S.C. § 7114(a)(1) preempted state tort claims against the union. *See Mims v. American Federation of Government Employees*, 531 So.2d 661 (Ala. 1988); *DeGrio v. AFGE*, 484 So.2d 1, 3-4 (Fla. 1986); *Wood v. AFGE*, 318 So.2d 568, 569-70 (S.C. 1984).

Cir. 1990); *Stephens v. Department of Health and Human Services ("HHS")*, 901 F.2d 1571, 1577 (11th Cir.) *cert. denied*, —— U.S. ——, 111 S.Ct. 555 (1990); *Spagnola v. Mathis*, 859 F.2d 223, 230 (D.C.Cir. 1988) (en banc) (per curiam); *Volk v. Hobson*, 866 F.2d 1398, 1403-04 (Fed. Cir.), *cert. denied*, 490 U.S. 1092 (1989); *Accord Berrios v. Department of Army*, 884 F.2d 28, 30-31 (1st Cir. 1989).

At least four circuits have viewed the CSRA as "sufficiently comprehensive to make reasonable the presumption that Congress intended to leave no room for state law" and therefore held that the Act preempts state-law claims arising from conduct actionable under the federal scheme. *Petrini v. Howard*, *supra*, 918 F.2d at 1484 (10th Cir.) [citation omitted] (defamation and intentional infliction of emotional distress). *See also Roth v. United States*, 952 F.2d 611, 614-616 (1st Cir. 1991) (defamation); *Saul v. U.S.*, *supra*, 928 F.2d at 842 (9th Cir.) (defamation and intentional infliction of emotional distress); *Broughton v. Courtney*, 861 F.2d 639, 644 (11th Cir. 1988) (tortious interference with employment). The Act's preemption even precludes malpractice suits by federal employees against union attorneys for negligent representation. *Montplaisir v. Leighton*, *supra*, 875 F.2d at 4.

Of particular relevance here are the appellate decisions recognizing the Act's preemption of causes of action arising under other federal statutes. For example, courts have held that the CSRA preempts review of federal personnel actions under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, even when such review was available prior to the Act's passage. *See McAuliffe v. Rice*, 966 F.2d 979, 980-81 (5th Cir. 1992) (CSRA precludes APA review of employee's discharge from nonappropriated fund instrumentality); *Ryon v. O'Neill*, 894 F.2d 199, 200 (6th Cir. 1990) (CSRA precludes APA and mandamus review of employee's claim

that reassignment constituted prohibited discriminaton on the basis of marital status); *Stephens v. HHS*, *supra*, 901 F.2d at 1575 (CSRA precludes APA and mandamus review of preference-eligible exempt employee's challenge to denial of promotion).

Similarly, the Act precludes suits by federal employees under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), ("FTCA") for injuries arising out of their employment. *See Premachandra v. United States*, 739 F.2d 392 (8th Cir. 1984) (No jurisdiction over federal employee's claims under FTCA for mental anguish and economic losses suffered upon discharge); *Rivera v. United States*, 924 F.2d 948, 952 (9th Cir. 1991) (CSRA precludes suit under FTCA for retaliatory harassment); *American Postal Workers Union v. U.S. Postal Service*, 940 F.2d 704, 708 (D.C. Cir. 1991) (CSRA preempts claim under FTCA for retaliatory discharge). In addition, when the CSRA otherwise precludes review, a court is divested of its jurisdiction under the Privacy Act, 5 U.S.C., § 552a. *Henderson v. Social Security Administration*, 908 F.2d 559, 561 (10th Cir. 1990).

In fact, the preemptive effect of the CSRA reaches federal statutes which otherwise expressly authorize suits by federal employees. *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir.) (en banc), *cert. denied*, —— U.S. ——, 111 S.Ct. 46 (1990). In the Fair Labor Standards Act ("FLSA"), Congress specifically granted federal employees the right to sue for overtime pay claims. 29 U.S.C. §§ 203, 216. While recognizing this fact, the Federal Circuit nevertheless held that the grievance procedures prescribed in 5 U.S.C. § 7121 preempted FLSA jurisdiction if the federal employee is subject to a collective bargaining agreement which does not expressly exclude overtime claims from its coverage. *Id.* at 1454-58.[4]

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[4] Only one post-*Fausto* case which squarely addresses the CSRA preemption argument declined to accord it that effect. In *United States v. Lund*, 853 F.2d 242, 247 (4th Cir. 1988), the Fourth Cir-

4. The Fifth Circuit considered the CSRA's labor relations provisions irrelevant to this case, stating that "the question is not whether the CSRA provides a remedy, but whether the LMRDA provides one." App., *infra*, 5a, n.2. In doing so, it blatantly disobeyed this Court's instruction to view Title VII as the "controlling authority" in the area of federal sector labor relations. *Karahalios v. NFFE Local 1263*, *supra*, 109 S.Ct. at 1285. Its summary dismissal of the CSRA bespeaks such judicial disregard for Congress' plan for federal sector labor relations as to threaten the primacy of the statutory design. By opening the door to judicial review of these claims, the court seriously undermines the congressional scheme for enforcement of union standards of conduct and employee rights under the Act. *See Bush v. Lucas*, *supra*, 462 U.S. at 388; *United States v. Fausto*, *supra*, 484 U.S. at 443-45; *Karahalios v. NFFE, Local 1263*, *supra*, 109 S.Ct. at 1286-88.

The Fifth Circuit's decision allowed Martinez to circumvent the congressionally mandated remedies for violations of 5 U.S.C. § 7120(d) and § 7102 by couching his complaint in terms of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.*, as amended. The LMRDA excludes Martinez' claims, however. It permits a civil action by "any person whose rights secured by the provisions of this subchapter have been infringed. . . ." 29 U.S.C. § 412. The rights secured by the subchapter are those enjoyed by members of "labor organizations," as defined in 29 U.S.C. § 402, and include

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cuit held that the civil provisions of the Act making nepotism a prohibited personnel practice subject to the Special Counsel's jurisdiction did not preclude criminal prosecution under the conflict of interest statute, 18 U.S.C. § 208. That case, however, did not involve a federal employee's right to pursue various avenues of relief, such as is at issue here, but rather "whether the CSRA's scheme of civil penalties for forbidden personnel practices has implicitly repealed the *government's* right to pursue criminal remedies. . . ." *Id.* at 248.

equal voting rights, freedom of assembly and speech, and a guarantee of due process in the union's disciplinary proceedings. 29 U.S.C. § 411. A "labor organization" for purposes of § 411 is one "engaged in an industry affecting commerce . . . which exist[] for the purpose in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours . . . ." 29 U.S.C. § 402(i). The term "[e]mployer means any employer or any group or association of employers engaged in an industry affecting commerce . . . *but does not include the United States* or any corporation wholly owned by the Government of the United States or any State or political subdivision thereof." 29 U.S.C. § 402(f) [emphasis supplied].

Here, the United States is the "employer." The "person" aggrieved is a *federal* employee. The "labor organization" whose office he sought and from which he derives his rights as a member is Local 1617, which solely represents federal employees. It is, therefore, incongruous to view the LMRDA, and not the CSRA, as governing this case. The court apparently believed such a result was, nevertheless, warranted under *Hester v. International Union of Operating Engineers*, 818 F.2d 1537 (11th Cir. 1987), *vacated on other grounds and remanded, International Union of Operating Engineers v. Hester*, 488 U.S. 1025 (1989).[5] App., *infra*, 7a, n.4. In that case, the Eleventh Circuit held that the operative issue with regard to LMRDA jurisdiction was not whether the statute covered the employer but whether the LMRDA covered the relevant labor organization. *Id.* at 1540. Citing a pre-CSRA decision that dealt with nonfederal public employees, it construed the LMRDA as applying to "mixed"

[5] The Supreme Court remanded the case for reconsideration in light of another decision dealing with the statute of limitations. On remand, the Eleventh Circuit reaffirmed its holding with regard to LMRDA subject matter jurisdiction on the grounds that the Court had not addressed the issue. *Hester v. International Union of Operating Engineers*, 878 F.2d 1309, 1310 (11th Cir. 1989).

unions which represent both private and public sector employees. *Id.* at 1541. It concluded that jurisdiction would lie after finding that Hester's local and international unions represented private sector employees and were thus subject to the Act. *Id.* at 1542-43.[6]

The *Hester* case was decided prior to this Court's rulings in *United States v. Fausto* and *Karahalios*. Those cases have so changed the landscape in the judicial treatment of federal employee job-related claims (*see* discussion *supra*) as to render suspect a pre-*Fausto* decision such as *Hester* finding district court jurisdiction over such claims. Neither the *Hester* court nor the Fifth Cir-

[6] Prior to the case at bar, no other appellate court affirmatively embraced the approach taken by the Eleventh Circuit. Notwithstanding the court's citation (app., *infra*, 7a), *Berardi v. Swanson Memorial Lodge No. 48*, 920 F.2d 198 (3rd Cir. 1990) involved a retired state police officer and thus is inapposite to the question of the availability of LMRDA jurisdiction to federal employees subject to the Civil Service Reform Act. The Second Circuit affirmed in an unpublished opinion a district court decision which relies on *Hester* in holding that a Veterans Administration employee whose international and local unions represented private sector employees could bring an action under the LMRDA. *See Laity v. Beatty*, 766 F. Supp. 92, 97-98 (W.D.N.Y. 1991), *aff'd* 956 F.2d 1160 (2d Cir. 1992) (unpublished). There, the district court relied on a pre-CSRA case as support for extending the LMRDA's coverage to the federal employee. In any event, this case is distinguishable from *Laity* insofar as here, Local 1617 represents only federal employees.

Even if *Hester* was the appropriate framework for deciding this case, the Fifth Circuit nevertheless erred in refusing to see that jurisdiction would be precluded by the fact that all of Martinez' claims involve matters concerning AFGE Local 1617 which exclusively represents federal employees. *Hester*, *supra*, 818 F.2d at 1541. In addition, even if Martinez' complaint is cognizable under the LMRDA, "the exclusivity provision included in § 403 of Title IV [29 U.S.C. § 483] plainly bars Title I relief when an individual union member challenges the validity of an election that has already been completed." *See Local No. 82, Furniture & Piano Moving v. Crowley*, 467 U.S. 526, 541, *reh'g denied*, 468 U.S. 1224 (1984). Thus, he could not, even under *Hester*, maintain his cause of action involving the decision to set-aside Local 1617's election.

cuit here analyzed whether the CSRA *preempted* jurisdiction over such claims. Had the Fifth Circuit employed the proper *preemption* analysis adopted by numerous other circuits, it would have had to conclude that the remedies embodied in the CSRA preclude judicial review of Martinez' claims under the LMRDA. *See e.g., Carter v. Gibbs, supra*, 909 F.2d 1452; *Premachandra v. United States, supra*, 739 F.2d 392; *Rivera v. United States, supra*, 924 F.2d at 952; *APWU v. U.S.P.S., supra*, 940 F.2d at 708; *Henderson v. Social Security Administration, supra*, 908 F.2d at 561; *McAuliffe v. Rice, supra*, 966 F.2d at 981; *Ryon v. O'Neill, supra*, 894 F.2d at 200; *Stephens v. HHS, supra*, 901 F.2d at 1575.

The CSRA's "integrated scheme of administrative and judicial review" forecloses any assertion that Congress intended to preserve, if one ever existed, a private cause of action in federal district court[7] under the LMRDA for federal employees alleging violations of standards of conduct or unfair labor practices. *Cf. United States v. Fausto, supra*, 484 U.S. at 445; *Karahalios, supra*, 109 S.Ct. at 1286-88. The CSRA clearly dictates that complaints alleging violations of the standards of conduct "*shall* be filed with the Assistant Secretary." 5 U.S.C.

[7] In fact, the CSRA carves out a very narrow role for the federal judiciary. The judicial review provision at 5 U.S.C. § 7123 empowers federal courts to act in only three instances: "Persons aggrieved by a final FLRA order may seek review in the appropriate court of appeals, § 7123(a); the FLRA may seek judicial enforcement of its orders, § 7123(b); and temporary injunctive relief is available to the FLRA to assist it in the discharge of its duties. § 7123(d)." The only reference to district court jurisdiction at 5 U.S.C. § 7123(d) authorizes *the FLRA* to seek temporary injunctive relief in federal district court following issuance of an unfair labor practice complaint by the FLRA General Counsel. Moreover, courts did not enforce standards of conduct or adjudicate unfair labor practice charges under the pre-Civil Service Reform Act regulatory scheme. Consequently, "there was not in this context any pre-existing judicial role that at least arguably Congress intended to preserve." *Karahalios v. NFFE, supra*, 109 S.Ct. at 1288.

§ 7120 (d) (emphasis added). To the extent that Martinez' claims might also be viewed as unfair labor practices, the FLRA has exclusive jurisdiction. 5 U.S.C. § 7118; *Karahalios, supra*, 109 S.Ct. 1282.

Applying well-established principles of statutory construction, it is clear that if § 412 of the LMRDA ever encompassed federal employee claims, the CSRA's specific remedial mandate narrowly tailored to the arena of federal employment implicitly repealed it. *Cf. APWU v. U.S.P.S., supra*, 940 F.2d at 708 ("Residual statute like FTCA cannot co-exist with [the CSRA's] comprehensive employment relations scheme"); *Harris v. United States*, 841 F.2d 1097, 1101 (Fed. Cir. 1988) (CSRA repeals by implication Tucker Act jurisdiction over federal employee claims for environmental differential pay); *Carter v. Gibbs, supra*, 909 F.2d at 1455 ("[T]he question here is not whether the CSRA implicitly repealed section 16 of the FLSA; it is whether an additional exception to CSRA section 7121(a)(1)'s exclusivity provision should be implied").

Moreover, the CSRA's preemptive effect is not limited to claims arising from disputes between a federal employee and his employer. On the contrary, it precludes jurisdiction over claims by federal employees against their union. For instance, a federal employee cannot sue his union in court for breach of its duty of fair representation, since the Act makes that claim actionable as a ULP within the exclusive jurisdiction of the FLRA. *Karahalios v. NFFE Local 1263, supra*, 109 S.Ct. 1282. Nor can federal employees bring malpractice claims against union attorneys into court, as such actions are also precluded by the CSRA's unfair labor practice procedures. *Montplaisir v. Leighton, supra*, 875 F.2d at 3-5.

We submit, therefore, that the court of appeals' decision fundamentally conflicts with the firm edict of this Court, as interpreted by a majority of the circuits, to

view the CSRA as the controlling authority on federal employee labor claims and to treat its remedial scheme as exclusive. By eschewing the CSRA remedies in this case, the Fifth Circuit's decision seriously undermines the meticulously crafted congressional scheme for federal sector labor relations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 12, 1993

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 91-5615

RAMIRO M. MARTINEZ, Individually and as President of American Federation of Government Employees, Local 1617,
Plaintiff-Appellant,

v.

THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, *et al.*,
Defendants-Appellees,

and

ROBERT GUTTMAN, U.S. Dept. of Labor, ETC.,
Intervenor-Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas

Jan. 12, 1993

Before BRIGHT,* JOLLY, and BARKSDALE, Circuit Judges.

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* Senior Circuit Judge of the Eighth Circuit, sitting by designation.

E. GRADY JOLLY, Circuit Judge:

The sole question with which we are presented is whether the federal courts have subject matter jurisdiction over this dispute. Ramiro M. Martinez, a federal employee, and a member of the American Federation of Government Employees ("AFGE"), sued it under the Labor-Management Reporting and Disclosure Act ("LMRDA") because it had removed him from office in his local union. The LMRDA grants federal courts jurisdiction over disputes between a union and its members if the union is a "labor organization" as the LMRDA defines the term. Unions that bargain solely with the government are not "labor organizations" subject to the LMRDA; all others are. The AFGE has stipulated that it "represents" private sector employees as well as government employees. This limited stipulation, however, does not make clear whether the AFGE deals with private sector employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms and conditions of employment. Thus, because we are uncertain whether jurisdiction over this dispute lies in the federal courts, we remand for further proceedings not inconsistent with this opinion.

I

Ramiro M. Martinez is a federal employee who works at the Kelly Air Force Base in San Antonio. The American Federation of Government Employees, Local 1617 ("Local 1617"), is the exclusive bargaining representative for the civilian employees working at the Kelly Air Force Base. Martinez is a member of the AFGE and Local 1617. All of Local 1617's members are federal employees. Local 1617 is chartered by its parent, the American Federation of Government Employees ("AFGE"). The AFGE is comprised of over a thousand local labor unions and represents almost 700,000 government employees. The parties stipulated that some of the AFGE's local unions "represent" both private and public sector employees.

In July of 1986 and again in February of 1989, the members of Local 1617 elected Martinez president. On January 3, 1989, AFGE National Vice President Glen J. Peterson ordered an investigation of Martinez to determine whether he had violated the AFGE's national constitution by selling a list of Local 1617's members' names and addresses to an insurance company. On March 28, John Sturdivant, AFGE's national president, found there was probable cause to believe that Martinez had sold the membership list. Believing that Local 1617 could not conduct a fair and impartial trial on the charges, Sturdivant appointed a trial committee composed of the presidents of three other AFGE locals. The trial committee, which Martinez contends was biased against him, concluded that Martinez had violated the union constitution and recommended that Sturdivant remove him from his office as president and bar him from holding any union office for three years. On August 24, Sturdivant accepted the trial committee's findings and recommendations and immediately removed Martinez from office.

In February, approximately the same time the AFGE was investigating Martinez, Local 1617 held its regularly scheduled election and Martinez was re-elected. Several unsuccessful candidates challenged the election, alleging that the union gave incumbents greater access to Local 1617's newspaper. After Local 1617's election committee dismissed the protests, two candidates filed appeals to National Vice President Peterson, who ordered an investigation of the election. Finding that incumbent union officers used union funds to enhance their campaigns, Peterson ordered a new election. Martinez appealed the decision to Sturdivant.

When Sturdivant denied his appeal, Martinez and the other Local 1617 officers filed a complaint with the Department of Labor, challenging the decision to overturn the February election. They alleged that the decision

violated the right of Local 1617's membership to elect their officers. They further alleged that the decision was arbitrary, capricious, and politically motivated. After conducting its own investigation, the Department of Labor dismissed the complaint.

II

Martinez then brought this action on September 7, 1989, in the United States District Court, Western District of Texas, at San Antonio. Martinez sued under the provisions of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 401, *et seq.* The complaint named the AFGE, some of its national officers, and some officers of other AFGE local unions as defendants. He alleged that the AFGE and its officers violated his rights under the LMRDA by removing him from office, by barring him from office for three years, and by invalidating the February union election in which he had been re-elected president.

On October 3, the AFGE and its officers filed a motion to dismiss or in the alternative for summary judgment. They argued that the court lacked subject matter jurisdicion because Martinez's claims were subject to the exclusive remedial scheme provided by Title VII of the Civil Service Reform Act ("CSRA") of 1978. 5 U.S.C. § 7101, *et seq.*[1] The Acting Assistant Secretary of Labor for Labor-Management standards, who administers section 7120 of Title VII of the CSRA, intervened

[1] Both the CSRA and the LMRDA grant certain similar rights to union members. The CSRA, however, applies only to federal employees who are union members. Unlike the LMRDA, the CSRA does not grant union members the right to sue their unions in federal court. Instead, federal employees who are union members must bring their grievances against their union before the Assistant Secretary of the Department of Labor. The instant case deals with a situation where the two statutes overlap because the AFGE admits members who are employed in both the public and the private sector.

as a defendant. The Assistant Secretary then filed his own motion to dismiss for lack of subject matter jurisdiction.

The district court held that the CSRA applies to the plaintiff's claims. Concluding that the CSRA's comprehensive statutory scheme precludes judicial review of Martinez's claim under the LMRDA, the district court granted the motions to dismiss.[2] Martinez appeals.

III

The only question before us is whether the LMRDA grants subject matter jurisdiction over Ramiro M. Martinez's claims. If it does, then the district court erred in dismissing the complaint. This question is purely legal and, thus, we review the district court's conclusions *de novo*. *United States v. Harrison*, 918 F.2d 469, 473. (5th Cir.1990).

We thus turn to the LMRDA and examine whether Martinez's claim finds a jurisdictional home. Section 412 of the LMRDA provides that:

> [a]ny person whose rights are secured by the provision of this subchapter have been infringed by any violation of the subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate.

29 U.S.C. § 412. Thus, Martinez as a "person," can bring an action against his union under section 412 if he

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[2] In reaching its decision, the district court relied on *Karahalios v. National Federation of Federal Employees*, 489 U.S. 527, 109 S.Ct. 1282, 103 L.Ed.2d 539 (1989). In *Karahalios*, the Court held that the CSRA does not create a private cause of action for federal employees to sue their unions. The Court reminded us that we should be reluctant to provide additional remedies where a statute expressly provides one. *Id.* at 533, 109 S.Ct. at 1286-87. *Karahalios*, however, does not govern the instant case. Here, the question is not whether the CSRA provides a remedy, but whether the LMRDA provides one.

has rights secured by the LMRDA that have been violated. The LMRDA grants certain rights "to every member of a labor organization." 29 U.S.C. § 411. It is undisputed that, in substance, Martinez asserts rights protected under the LMRDA. Those rights include the right to vote and otherwise to participate in union affairs. Martinez contends that the AFGE violated these protected rights when it wrongly denied him the right to participate in his union, including the right to hold office.[3] Thus, the only remaining question as to whether Martinez has stated a claim under the LMRDA that would give us subject matter jurisdiction, is whether he is a member of a "labor organization." This inquiry is determinative of jurisdiction here because the rights that Martinez asserts belong only to "every member of a labor organization." 29 U.S.C. § 411.

The LMRDA defines a "labor organization" as:

> [any organization] in which employees participate and which exists for the purpose, in whole or in part, of *dealing with employers* concerning grievances, labor disputes, wages, rates of pay, hours, or other terms and conditions of employment. (Emphasis added.)

29 U.S.C. § 402(i). Thus, the question is whether the AFGE meets this definition: does it deal with employers concerning the terms and conditions of employment? "Employer" is defined under the LMRDA as any employer except "the United States or any corporation wholly owned by the government of the United States or any state or political subdivision thereof." 29 U.S.C.

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[3] Despite the AFGE's arguments to the contrary, Martinez's membership in Local 1617, a purely federal union, does not affect his rights under the LMRDA as a member of the AFGE. The national AFGE and its national officers are the defendants in the instant suit, and it is their actions that are the subject of the suit. If Martinez's local union and its officers were the defendants, we would have an entirely different case.

§ 402(e). We, therefore, ask whether the AFGE or any of its locals deal with "any employer except the government—federal, state or local?" If it does, federal courts have jurisdiction over Martinez's claims against the AFGE; if the only employer that the AFGE and its locals deal with is the government, we must affirm the dismissal of the complaint because the AFGE would not be a "labor organization" under the LMRDA.

On the record before us, the answer to this question is unclear. The AFGE has stipulated that it represents non-governmental employees. At the same time, the AFGE argues that it has no contracts with private employers and that no private employers recognize the AFGE as the exclusive bargaining agent of its employees. In short, the AFGE contends it is not a labor organization because, although it admits into membership some persons who work in the private sector, it does not deal with their private employers. Unfortunately, except for the somewhat ambiguous stipulation, the record is bare on the essential question of jurisdiction. This court has a duty to determine whether it has jurisdiction over any case before it. *Morales v. Pan American Life Ins. Co.*, 914 F.2d 83, 85 (5th Cir.1990). We, therefore, must remand for further factual findings in order to determine whether we have jurisdiction. If the district court finds that the AFGE, through any of its locals, deals with any private sector employers on behalf of its members concerning the terms and conditions of employment, then the district court has jurisdiction and Martinez must have an opportunity to litigate his claims in federal court. Otherwise, the district court must dismiss the proceeding.[4]

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[4] *See Berardi v. Swanson Memorial Lodge No. 48*, 920 F.2d 198 (3d Cir.1990). Here, a government employee sued his union. The union admitted some honorary members, but it was unclear whether the union dealt with their employers. The court remanded for further factual findings. *See also Hester v. Intern. Union of Operating Engineers*, 818 F.2d 1537 (11th Cir.1987).

Before concluding, we pause to note the limited nature of our decision. A federal employee can only bring suit in federal court under the LMRDA when his dispute is with his union and the union happens to deal with private employers concerning the terms and conditions of employment. This decision today merely ensures that all members of the same national union have the same rights vis-a-vis their national union.

IV

For all of the reasons above, we REVERSE the judgment of the district court and REMAND for further proceedings not inconsistent with this opinon.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Case No. SA 89 CA 1225

RAMIRO M. MARTINEZ,

Plaintiff,

v.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, *et al.*,

Defendants.

[Filed Mar. 29, 1991]

ORDER

The question before the Court is whether the Court has subject matter jurisdiciton over Plaintiff's Complaint. Because the Court concludes that the Civil Service Reform Act establishes the exclusive statutory remedy for Plaintiff's claims, this Court lacks subject matter jurisdiction over Plaintiff's Complaint. Accordingly, the Plaintiff's Complaint is DISMISSED.

A. BACKGROUND

On January 3, 1989, Mr. Glen Peterson, National Vice President of the American Federation of Government Employees (AFGE) District 10, requested an investigation of the charge that Plaintiff, who was then President of Local 1617,[1] sold a list of members' names and addresses to the Benefit Trust Life Insurance Company for $500.00. On June 22, 1989, a hearing was

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[1] AFGE Local 1617 represents federal employees at Kelly Air Force Base in San Antonio, Texas.

held on this charge. On July 10, 1989, the trial committee concluded that Plaintiff was compensated by the insurance company and that Plaintiff did not act in a responsible manner. On August 24, 1989, based upon those findings, John Sturdivant, National President of AFGE, removed Plaintiff from office and barred him from holding office for three years.

In the interim, on February 8, 1989, Local 1617 held an election of officers and Plaintiff won re-election as President of Local 1617. Thereafter, other candidates for office protested the 1989 election, alleging that certain candidates had access to the Local's newspaper, while other candidates were denied that opportunity. The National Vice President reversed the election and ordered a new election. On June 27, 1989, Plaintiff appealed this decision to the National President. The National President denied the appeal on the ground that the Local's newspaper had been used to promote the candidacy of certain officers.

On August 25, 1989, Plaintiff filed a complaint with the Department of Labor, alleging that Title IV of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 401, *et seq.* had been violated. Plaintiff asserted that the National Vice President's order that a remedial election be conducted was politically motivated. The Director of the Office of Elections, Trusteeship and International Union Audits (Director) within the Office of the Assistant Secretary, caused an investigation of the complaint to be conducted.

The Director's investigation established that the National Vice President's decision was consistent with the intent of the LMRDA. On November 27, 1989, the Director dismissed the complaint. On December 6, 1989, Plaintiff appealed the dismissal to the Assistant Secretary for Labor-Management Standards. On April 24, 1990, the Assistant Secretary affirmed the dismissal and upheld the AFGE's decision to overturn election.

In September 1989, Plaintiff filed this lawsuit, challenging his removal and suspension from office and the conduct of the remedial election. Plaintiff invoked the LMRDA as the mechanism for remedying the alleged violations. Defendants asserted that Plaintiff's reliance on the LMRDA was misplaced and asserted that the CSRA is the exclusive authority for resolving the dispute. Defendant-Intervenor also asserted that the CSRA governs this matter.

B. THE CSRA APPLIES TO PLAINTIFF'S CLAIMS

Plaintiff's dispute arises from his removal as President of Local 1617 and the remedial election of Local 1617 officers.

Title VII of the Federal Labor-Management Relations Statute is the controlling authority for resolving issues involving labor relations in the public sector. *Karahalios v. National Federation of Federal Employees, Local 1263*, —— U.S. ——, 109 S. Ct. 1282, 1285 (1989). The statute establishes that

> [i]t is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.

5 U.S.C. § 7101(b). Thus, the Court must ascertain whether Plaintiff is an employee of the Federal Government and whether his claim involves rights and obligations covered by the statute.

The statute defines "employee" as an "individual employed in an agency." 5 U.S.C. § 7103(a)(2)(A). The term "agency" includes an "executive agency." 5 U.S.C.

§ 7103(a)(3). The term "executive agency" incorporates the Department of Defense. 5 U.S.C. § 101. Plaintiff has been employed by the Department of the Air Force at Kelly Air Force Base in San Antonio, Texas since 1954. As an "individual employed in an agency," Plaintiff, is an "employee" of the Federal Government. 5 U.S.C. § 7103(a)(2).

The next issue is whether Plaintiff's Complaint involves rights and obligations covered by the statute. Plaintiff alleges impropriety in his removal and suspension from office and the AFGE's handling of the protests lodged against his re-election as president. The relevant statutory provision mandates that "an agency shall only accord recognition to a labor organization that is free from corrupt influences and influences opposed to basic democratic principles." 5 U.S.C. § 7120(a). Such a labor organization must be

> subject to governing requirements adopted by the organization or by a national or international labor organization or federation of labor organizations with which it is affiliated, or in which it participates, containing explicit and detailed provisions to which it subscribes calling for—
>
> (1) the maintenance of democratic procedures and practices including provisions for periodic elections to be conducted subject to recognized safeguards and provisions defining and securing the right of individual members to participate in the affairs of the organization, to receive fair and equal treatment under the governing rules of the organization, and to receive fair process in disciplinary proceedings . . . .

5 U.S.C. § 7120(a).

Under the CSRA, " 'labor organization' means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has

as a purpose the dealing with an agency concerning grievances and conditions of employment, ..." 5 U.S.C. § 7103(a)(4). Both the AFGE and Local 1617 are composed in whole or in part of federal employees and have as a purpose the dealing with federal agencies concerning grievances and conditions of employment. Therefore, because both the AFGE and Local 1617 are labor organizations, they are subject to the statute.

The next issue is whether Plaintiff's allegations state a claim under the statute. In his Complaint, Plaintiff complains of unfairness in the proceedings that resulted in his removal and suspension from union office. If true, this assertion would state a violation of the "fair process in disciplinary proceedings." 5 U.S.C. § 7120(a). Plaintiff also alleges impropriety in the reversal of the February 8, 1989 election. The CSRA mandates "periodic elections to be conducted subject to recognized safeguards." 5 U.S.C. § 7120(a). Thus, the Court finds that Plaintiff's claims are covered by 5 U.S.C. § 7120.

C. THE CSRA CONTAINS THE EXCLUSIVE REMEDY FOR PLAINTIFF'S CLAIMS

The Court, finding that the CSRA applies to Plaintiff's claims, is compelled to dismiss Plaintiff's Complaint as the CSRA's comprehensive statutory scheme precludes judicial review of the Plaintiff's claims. *Karahalios v. National Federation of Federal Employees, Local 1263*, 109 S. Ct. 1282, 1286 (1989).

IT IS SO ORDERED.

Signed this 29 day of March 1991.

/s/ Emilio M. Garza
EMILIO M. GARZA
United States District Judge

Supreme Court, U.S.
FILED
JUN 1 1993
OFFICE OF THE CLERK

No. 92-1640

In The

Supreme Court of the United States

October Term, 1992

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, JOHN STURDIVANT, GLEN PETERSON, HARRY DAWSON, JERRY BLACK, ALEJANDRO GONZALES,

Petitioners,

v.

RAMIRO MARTINEZ,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Court should deny Petitioners' Petition for Writ of Certiorari because the decision at bar involves a judgment remanding a case which does not bring into consideration important questions of law that are fundamental to the further conduct of the case or would otherwise qualify as a basis for Certiorari.

II. Whether the Court below properly found that the Labor-Management Reporting and Disclosure Act grants subject matter jurisdiction over Respondent's claims?

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BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

Respondent, Ramiro Martinez, requests that the Court deny the Petitioners' Petition for Writ of Certiorari, and remand the case to Federal District Court to enforce the Fifth Circuit Court of Appeals' decision remanding the case for further proceedings.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 980 F.2d 2039. The opinion of the district court is set forth at App., *infra*, 9a-13a.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1993. A petition for a writ of certiorari was filed on April 12, 1993, within 90 days of the date of the entry of judgment below. The jurisdiction of this court was invoked by the Petitioners pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

1. 28 U.S.C. Section 1254(1). Courts of appeals; certiorari; certified questions

Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

2. Rule 10 of the RULES OF THE SUPREME COURT OF THE UNITED STATES.

3. The Labor-Management Reporting and Disclosure Act, 29 U.S.C. Section 401, *et seq.* (the "LMRDA") provides in relevant part:

> (i) "Labor organization" means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body.

29 U.S.C. Section 402(i).

> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplines . . . unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

29 U.S.C. Section 411(a)(5). 29 U.S.C. Section 412 states that

> [a]ny person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States. . . .

STATEMENT OF THE CASE

Respondent agrees with the statement of the case as set out in Sections I and II of the opinion of the Court of Appeals for the Fifth Circuit at 980 F.2d 2039 and attached as Appendix A, *infra*, 2a-5a.

Respondent adds only the following. On appeal the Fifth Circuit considered whether the Civil Service Reform Act of 1978's (the "CSRA") comprehensive remedial scheme applied to Respondent's cause of action. App., *infra*, 4a, fn.1. The Court found that "[t]he instant case deals with a situation where the two statutes, [the LMRDA and the CSRA], overlap because the American Federation of Government Employees (the "AFGE") admits members who are employed in both the public and the private sector". *Id.* The Court further found that the question before it was "whether the LMRDA provides [a remedy], [and] not whether the CSRA provides [Respondent] a remedy". App., *infra*, 5a, fn.2. Respondent's "membership in Local 1617, a purely private union, does not affect his rights under the LMRDA as a member of the AFGE". App, *infra*, 6a, fn.3. The issue is whether AFGE's status, **and not Local 1617's status,** as a "mixed union" permits the Respondent to maintain his actions in federal district court under the LMRDA. App., *infra*, 7a-8a. The Court remanded the case for further proceeding to determine AFGE's status. *Id.*

REASONS FOR DENYING THE PETITION

Summary of Arguments

Petitioners' Petition for a Writ of Certiorari should be denied for the following reasons:

1. This Court's jurisdiction should not be invoked because the Court of Appeals for the Fifth Circuit has not rendered a decision in conflict with the decision of another United States Court of Appeals on the same issue, nor has it decided a federal question in a way that conflicts with applicable decisions of this Court. The Court of Appeals for the Fifth Circuit simply analyzed the facts and the arguments, and came to the conclusion that an individual, under the appropriate circumstances, could assert a cause of action under the LMRDA. With respect to the case at bar, the court determined that more factual findings were needed in order to determine whether the plaintiff in the case at bar could assert a cause of action under the LMRDA.

2. The jurisdiction of this Court, if any, should be denied until proper findings of fact, which were ordered by the court below in its decision to remand the case, are ultimately determined. The decision of the Court of Appeals for the Fifth Circuit does not bring into consideration important questions of law that are fundamental to the further conduct of the case.

3. The court below was correct when it properly posited the issue as being – "[W]hether the LMRDA grants subject matter jurisdiction over Ramiro M. Martinez's claims". App., *infra*, 5a. The Court of Appeals for the Fifth Circuit was correct in recognizing that the

LMRDA does not preempt the CSRA. Under the proper facts and pleadings, such as the ones existing in the case at bar, a plaintiff may assert a legally cognizable cause of action under the LMRDA.

4. The stipulation made by the Petitioners that the AFGE represents non-governmental employees is sufficient to categorize it as a "labor organization" as the LMRDA defines the term. This stipulation subjects the Petitioners to the LMRDA, and thereby federal district court jurisdiction.

The LMRDA defines a "labor organization" as:

> "[any organization] in which employees participate and **which exists for the purpose,** in whole or in part, of dealing with employers . . . ". (Emphasis added.) 29 U.S.C. Section 402(i).

The key language under the rules of grammar and statutory construction are the words "which exists for the purpose", and not the words "dealing with employers". Actual representational actions are not needed to classify an organization as a "labor organization". Mere existence for the purpose of dealing with employers suffices.

Due to the aforementioned reasons the court should deny Petitioners' Petition for Writ for Certiorari.

Arguments

Petitioners attempted to invoke "[t]he jurisdiction of this court . . . under 28 U.S.C. section 1254(1)", (*Petition For a Writ of Certiorari*, p.2), however the case at bar does not involve a significant constitutional question or an issue of substantial public interest.

28 U.S.C. Section 1254(1) is the general jurisdictional statute for appeals to the United States Supreme Court by Writ of Certiorari. This statute must be read in conjunction with Rule 10 of the Rules of The Supreme Court of the United States. Rule 10 delineates some key factors which must be at issue before the Supreme Court will grant a petitioner's petition for writ of certiorari.

Rule 10 of the Rules of the Supreme Court of the United States states:

> Considerations Governing Review on Writ of Certiorari
>
> .1. A review on writ of certiorari is not a matter of right, but a judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

The case at bar does not involve any key factors which would call for this Court's grant of jurisdiction pursuant to a writ of certiorari. *See,* opinion of the Court of Appeals for the Fifth Circuit at App., *infra,* 1a-8a.

There are no conflicting opinions between the circuits or between the Fifth Circuit and this Court. No other court of appeals has considered the issue addressed by the Court Appeals for the Fifth Circuit, i.e. whether a plaintiff may choose to plead and pursue a cause of action under the LMRDA or the CSRA when the statutes overlap. Since this issue has not been addressed by any other court, Respondent believes it is incorrect for Petitioners to state that the Fifth Circuit's opinion is in conflict with other courts. The opinion of the Fifth Circuit does not directly address the issue raised by Petitioners. There is presently no important question of federal law which should be settled by this Court.

The Court of Appeals for the Fifth Circuit has remanded the case for further factual findings, it has not disposed of the case in any manner. The issue presently advanced by the Petitioners is not ripe for consideration by this Court. Petitioners' Petition for Writ of Certiorari is thus frivolous and should be denied, and damages should be assessed against Petitioners pursuant to Rule 42.2, Rules of the Supreme Court, and current case law.

Tatum v. Regents of University of Nebraska, 460 U.S. 1048, 103 S.Ct. 1450, 75 L.Ed.2d 804 (1983).

Petitioners' Petition for a Writ of Certiorari misstates the issue at hand. Petitioners focus the Court's attention on collateral issues which the Court of Appeals for the Fifth Circuit properly did not address.

Petitioners state, in their "Question Presented", that "the court below improperly departed from the rule established by this Court, and adopted by the overwhelming majority of circuit and state courts, that the Civil Service Reform Act provides the exclusive remedial scheme for federal employee claims arising under the Act". Petitioners contend that a writ of certiorari by this Court is mandated in order to clarify any inconsistencies among the courts. Petitioners' statement is incorrect for the court below never ruled that the CSRA did not provide the exclusive remedial scheme for federal employee **claims** arising under **the Act.** App., *infra*, 1a-8a.

The court below observed that this "case deals with a situation where the two statutes [the LMRDA and CSRA,] overlap and that the facts and plaintiff's pleading may assert a cause of action under the LMRDA depending on other factors." App., *infra*, 4a, fn.1.

The question presented by Petitioners fails to properly focus on the true issue presented in the case at bar. As the Court of Appeals for the Fifth Circuit correctly pointed out, "[t]he only question before us is whether the LMRDA grants subject matter jurisdiction over [Respondent] Ramiro M. Martinez's claim". App., *infra*, 5a. In other words, the court is asking: Do the facts and Respondent's pleadings allege a cause of action under the

LMRDA? Whether a cause of action would also lie pursuant to the CSRA is irrelevant. Respondent did not plead such a cause. The Plaintiff is the master of his claim. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392-393, ___ S.Ct. ___, ___ L.Ed.2d ___ (1987).

Two statutes addressing labor relations have been adopted by Congress. The Department of Labor has and continues to promulgate regulations pursuant to each statute. No statute nor judicial decision has ever, explicitly or implicitly, totally preempted the LMRDA or the pertinent provisions currently under consideration. The Department of Labor's promulgation of regulations pursuant to the LMRDA lead to the unmistakable conclusion that neither Congress or the Department of Labor believe nor intended for the LMRDA to be preempted by the CSRA. Although the district court relied on *Karahalios v. National Federation of Federal Employees*, 489 U.S. 527, 109 S.Ct. 1282, 103 L.Ed.2d 539 (1989) to dismiss Respondent's claim, the Court of Appeals for the Fifth Circuit correctly pointed out that *Karahalios* is distinguishable from the present case, and therefore reversed the decision of the district court. App., *infra*, 5a, fn.2. *Karahalios* stands for the proposition that courts should be reluctant to provide additional remedies where a statute expressly provides one. *Id.* As the Court of Appeals for the Fifth Circuit correctly pointed out, the issue in the case at bar is not whether CSRA provides a remedy or whether judicial incursion into the CSRA's remedial scheme is contemplated. Rather, the issue is whether the LMRDA provides a cause of action and a remedy for Respondent. *Id.*

The preemption argument raised by the Petitioners is groundless.

The question which the Court of Appeals for the Fifth Circuit was unable to resolve with the existing facts of the case is whether the Respondent may actually raise a claim pursuant to the LMRDA.

The Court of Appeals for the Fifth Circuit reviewed 29 U.S.C. Sections 412 and 411 respectively. It found that Respondent is a "person", and that he had rights secured by the LMRDA which he contended had been violated. App., *infra*, 5a-6a. The court below found that Respondent was a member of a union, the AFGE. It found that his LMRDA rights vis-a-vis the parent AFGE union, and not Local 1617, were the correct focus when deciding whether LMRDA causes of action could be invoked.

The question presented, i.e. whether the Respondent could state a cause of action under the LMRDA, turns on whether Respondent is a member of a "labor organization" as that term is defined under 29 U.S.C. Section 402(i). *Id.* In other words, "whether the AFGE or any of its locals" meet the definition of a "labor organization". App., *infra*, 6a-7a.

The court below determined that under the present facts of the case it was unable to find whether or not Petitioner AFGE was a "labor organization". Therefore, the court remanded the case for further factual findings. App., *infra*, 7a-8a. Specifically, the Court of Appeals for the Fifth Circuit would like the district court to determine whether "the AFGE, through any of its locals, deals with any private sector employers on behalf of its members concerning the terms and conditions of employment". App., *infra*, 7a. If it does, the AFGE is representing non-

governmental employees and is a "labor organization" as defined by the LMRDA. *Id.*

Respondent believes that the course of the proceedings ordered by the court below is appropriate, and that the evidence will show that the AFGE and/or its locals do represent non-governmental employees. The AFGE qualifies as a "labor organization". Respondent believes that this finding may currently be made due to the following reasons.

The LMRDA defines a "labor organization" as:

> [any organization] in which employees participate and **which exists for the purpose,** in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms and conditions of employment. (Emphasis added.) 29 U.S.C. Section 402(i).

The court below focused on the phrase "dealing with employers" as determinative of whether or not an organization which "represents" employees can be defined as a "labor organization". The court below ruled that for a union to be defined as a "labor organization" within the definition of the LMRDA it must "represent" non-governmental employees. App., *infra,* 6a-8a. This term is in turn defined by the actions of an organization in **actually** dealing with private sector employers on behalf of its members concerning the terms and conditions of their employment. App., *infra,* 6a-7a.

Respondent believes that the proper focus should be the phrase "which exists for the purpose".

Rules of grammar, the plain meaning rule, and rules of statutory construction lead to the logical conclusion that the phrase "which exists for the purpose" is the controlling clause. No actual representational actions are needed to classify an organization as a labor organization. Mere existence for the purpose of representation should suffice.

Alternatively, if the Court determines that the phrase "dealing with employers" is the key term, Respondent believes that the act of holding oneself out as a representative for another, such as the AFGE stipulation that it represents non-governmental employees, is a sufficient representational act, and thus brings AFGE within the definition of a "labor organization". The act of holding oneself out as a representative of another may deter others from entering into negotiations with the represented individual(s), and thus prevent others from actually entering into collective bargaining agreements.

Respondent therefore believes that the actions of the Petitioners bring the AFGE within the definition of a "labor organization". Respondent may assert a cause of action against Petitioners under the LMRDA.

CONCLUSION

For the foregoing reasons Respondent respectfully requests that the Court deny Petitioners' Petition for Writ of Certiorari. Respondent also requests that the Court award him just damages against the Petitioners

pursuant to Rule 42.2 and current case law due to Petitioners' improper and frivolous Petition For A Writ Of Certiorari.

Respectfully submitted,

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May 28, 1993

RESPONDENT'S APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 91-5615

RAMIRO M. MARTINEZ, Individually and as President of American Federation of Government Employees, Local 1617,
Plaintiff-Appellant,

v.

THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, *et al.*,
Defendants-Appellees,

and

ROBERT GUTTMAN, U.S. Dept. of Labor, ETC.,
Intervenor-Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas

Jan. 12, 1993

Before BRIGHT,* JOLLY, and BARKSDALE, Circuit Judges.

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* Senior Circuit Judge of the Eighth Circuit, sitting by designation.

E. GRADY JOLLY, Circuit Judge:

The sole question with which we are presented is whether the federal courts have subject matter jurisdiction over this dispute. Ramiro M. Martinez, a federal employee, and a member of the American Federation of Government Employees ("AFGE"), sued it under the Labor-Management Reporting and Disclosure Act ("LMRDA") because it had removed him from office in his local union. The LMRDA grants federal courts jurisdiction over disputes between a union and its members if the union is a "labor organization" as the LMRDA defines the term. Unions that bargain solely with the government are not "labor organizations" subject to the LMRDA; all others are. The AFGE has stipulated that it "represents" private sector employees as well as government employees. This limited stipulation, however, does not make clear whether the AFGE deals with private sector employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms and conditions of employment. Thus, because we are uncertain whether jurisdiction over this dispute lies in the federal courts, we remand for further proceedings not inconsistent with this opinion.

I

Ramiro M. Martinez is a federal employee who works at the Kelly Air Force Base in San Antonio. The American Federation of Government Employees, Local 1617 ("Local 1617"), is the exclusive bargaining representative for the civilian employees working at the Kelly Air Force Base. Martinez is a member of the AFGE and Local 1617. All of

Local 1617's members are federal employees. Local 1617 is chartered by its parent, the American Federation of Government Employees ("AFGE"). The AFGE is comprised of over a thousand local labor unions and represents almost 700,000 government employees. The parties stipulated that some of the AFGE's local unions "represent" both private and public sector employees.

In July of 1986 and again in February of 1989, the members of Local 1617 elected Martinez president. On January 3, 1989, AFGE National Vice President Glen J. Peterson ordered an investigation of Martinez to determine whether he had violated the AFGE's national constitution by selling a list of Local 1617's members' names and addresses to an insurance company. On March 28, John Sturdivant, AFGE's national president, found there was probable cause to believe that Martinez had sold the membership list. Believing that Local 1617 could not conduct a fair and impartial trial on the charges, Sturdivant appointed a trial committee composed of the presidents of three other AFGE locals. The trial committee, which Martinez contends was biased against him, concluded that Martinez had violated the union constitution and recommended that Sturdivant remove him from his office as president and bar him from holding any union office for three years. On August 24, Sturdivant accepted the trial committee's findings and recommendations and immediately removed Martinez from office.

In February, approximately the same time the AFGE was investigating Martinez, Local 1617 held its regularly scheduled election and Martinez was re-elected. Several unsuccessful candidates challenged the election, alleging that the union gave incumbents greater access to Local

1617's newspaper. After Local 1617's election committee dismissed the protests, two candidates filed appeals to National Vice President Peterson, who ordered an investigation of the election. Finding that incumbent union officers used union funds to enhance their campaigns, Peterson ordered a new election. Martinez appealed the decision to Sturdivant.

When Sturdivant denied his appeal, Martinez and the other Local 1617 officers filed a complaint with the Department of Labor, challenging the decision to overturn the February election. They alleged that the decision violated the right of Local 1617's membership to elect their officers. They further alleged that the decision was arbitrary, capricious, and politically motivated. After conducting its own investigation, the Department of Labor dismissed the complaint.

II

Martinez then brought this action on September 7, 1989, in the United States District Court, Western District of Texas, at San Antonio. Martinez sued under the provisions of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 401, *et seq.* The complaint named the AFGE, some of its national officers, and some officers of other AFGE local unions as defendants. He alleged that the AFGE and its officers violated his rights under the LMRDA by removing him from office, by barring him from office for three years, and by invalidating the February union election in which he had been re-elected president.

On October 3, the AFGE and its officers filed a motion to dismiss or in the alternative for summary judgment. They argued that the court lacked subject matter jurisdiction because Martinez's claims were subject to the exclusive remedial scheme provided by Title VII of the Civil Service Reform Act ("CSRA") of 1978. 5 U.S.C. § 7101, *et seq.*[1] The Acting Assistant Secretary of Labor for Labor-Management standards, who administers section 7120 of Title VII of the CSRA, intervened as a defendant. The Assistant Secretary then filed his own motion to dismiss for lack of subject matter jurisdiction.

The district court held that the CSRA applies to the plaintiff's claims. Concluding that the CSRA's comprehensive statutory scheme precludes judicial review of Martinez's claim under the LMRDA, the district court granted the motions to dismiss.[2] Martinez appeals.

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[1] Both the CSRA and the LMRDA grant certain similar rights to union members. The CSRA, however, applies only to federal employees who are union members. Unlike the LMRDA, the CSRA does not grant union members the right to sue their unions in federal court. Instead, federal employees who are union members must bring their grievances against their union before the Assistant Secretary of the Department of Labor. The instant case deals with a situation where the two statues overlap because the AFGE admits members who are employed in both the public and the private sector.

[2] In reaching its decision, the district court relied on *Karahalios v. National Federation of Federal Employees*, 489 U.S. 527, 109 S.Ct. 1282, 103 L.Ed.2d 539 (1989). In *Karahalios*, the Court held that the CSRA does not create a private cause of action for federal employees to sue their unions. The Court reminded us that we should be reluctant to provide additional remedies where a statute expressly provides one. *Id.* at 533, 109 S.Ct. at 1286-87. *Karahalios*, however, does not govern the instant

III

The only question before us is whether the LMRDA grants subject matter jurisdiction over Ramiro M. Martinez's claims. If it does, then the district court erred in dismissing the complaint. This question is purely legal and, thus, we review the district court's conclusions *de novo*. *United States v. Harrison*, 918 F.2d 469, 473 (5th Cir.1990).

We thus turn to the LMRDA and examine whether Martinez's claim finds a jurisdictional home. Section 412 of the LMRDA provides that:

> [a]ny person whose rights are secured by the provision of this subchapter have been infringed by any violation of the subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate.

29 U.S.C. § 412. Thus, Martinez as a "person," can bring an action against his union under section 412 if he has rights secured by the LMRDA that have been violated. The LMRDA grants certain rights "to every member of a labor organization." 29 U.S.C. § 411. It is undisputed that, in substance, Martinez asserts rights protected under the LMRDA. Those rights include the right to vote and otherwise to participate in union affairs. Martinez contends that the AFGE violated these protected rights when it wrongly denied him the right to participate in his union,

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case. Here, the question is not whether the CSRA provides a remedy, but whether the LMRDA provides one.

including the right to hold office.[3] Thus, the only remaining question as to whether Martinez has stated a claim under the LMRDA that would give us subject matter jurisdiction, is whether he is a member of a "labor organization." This inquiry is determinative of jurisdiction here because the rights that Martinez asserts belong only to "every member of a labor organization." 29 U.S.C. § 411.

The LMRDA defines a "labor organization" as:

> [any organization] in which employees participate and which exists for the purpose, in whole or in part, of *dealing with employers* concerning grievances, labor disputes, wages, rates of pay, hours, or other terms and conditions of employment. (Emphasis added.)

29 U.S.C. § 402(i). Thus, the question is whether the AFGE meets this definition: does it deal with employers concerning the terms and conditions of employment? "Employer" is defined under the LMRDA as any employer except "the United States or any corporation wholly owned by the government of the United States or any state or political subdivision thereof." 29 U.S.C. § 402(e). We, therefore, ask whether the AFGE or any of its locals deal with "any employer except the government – federal, state or local?" If it does, federal courts have jurisdiction over Martinez's claims against the AFGE; if

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[3] Despite the AFGE's arguments to the contrary, Martinez's membership in Local 1617, a purely federal union, does not affect his rights under the LMRDA as a member of the AFGE. The national AFGE and its national officers are the defendants in the instant suit, and it is their actions that are the subject of the suit. If Martinez's local union and its officers were the defendants, we would have an entirely different case.

the only employer that the AFGE and its locals deal with is the government, we must affirm the dismissal of the complaint because the AFGE would not be a "labor organization" under the LMRDA.

On the record before us, the answer to this question is unclear. The AFGE has stipulated that it represents non-governmental employees. At the same time, the AFGE argues that it has no contracts with private employers and that no private employers recognize the AFGE as the exclusive bargaining agent of its employees. In short, the AFGE contends it is not a labor organization because, although it admits into membership some persons who work in the private sector, it does not deal with their private employers. Unfortunately, except for the somewhat ambiguous stipulation, the record is bare on the essential question of jurisdiction. This court has a duty to determine whether it has jurisdiction over any case before it. *Morales v. Pan American Life Ins. Co.*, 914 F.2d 83, 85 (5th Cir.1990). We, therefore, must remand for further factual findings in order to determine whether we have jurisdiction. If the district court finds that the AFGE, through any of its locals, deals with any private sector employers on behalf of its members concerning the terms and conditions of employment, then the district court has jurisdiction and Martinez must have an opportunity to litigate his claims in federal court. Otherwise, the district court must dismiss the proceeding.[4]

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[4] *See Berardi v. Swanson Memorial Lodge No. 48*, 920 F.2d 198 (3d Cir.1990). Here, a government employee sued his union. The union admitted some honorary members, but it was unclear whether the union dealt with their employers. The court

Before concluding, we pause to note the limited nature of our decision. A federal employee can only bring suit in federal court under the LMRDA when his dispute is with his union and happens to deal with private employers concerning the terms and conditions of employment. This decision today merely ensures that all members of the same national union have the same rights vis-a-vis their national union.

IV

For all of the reasons above, we REVERSE the judgment of the district court and REMAND for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

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remanded for further factual findings. *See also Hester v. Intern. Union of Operating Engineers*, 818 F.2d 1537 (11th Cir.1987).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Case No. SA 89 CA 1225

RAMIRO M. MARTINEZ,

Plaintiff,

v.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, *et al.*,

Defendants.

[Filed Mar. 29, 1991]

ORDER

The question before the Court is whether the Court has subject matter jurisdiction over Plaintiff's Complaint. Because the Court concludes that the Civil Service Reform Act establishes the exclusive statutory remedy for Plaintiff's claims, this Court lacks subject matter jurisdiction over Plaintiff's Complaint. Accordingly, the Plaintiff's Complaint is DISMISSED.

A. BACKGROUND

On January 3, 1989, Mr. Glen Peterson, National Vice President of the American Federation of Government Employees (AFGE) District 10, requested an investigation

of the charge that Plaintiff, who was then President of Local 1617,[1] sold a list of members' names and addresses to the Benefit Trust Life Insurance Company for $500.00. On June 22, 1989, a hearing was held on this charge. On July 10, 1989, the trial committee concluded that Plaintiff was compensated by the insurance company and that Plaintiff did not act in a responsible manner. On August 24, 1989, based upon those findings, John Sturdivant, National President of AFGE, removed Plaintiff from office and barred him from holding office for three years.

In the interim, on February 8, 1989, Local 1617 held an election of officers and Plaintiff won re-election as President of Local 1617. Thereafter, other candidates for office protested the 1989 elections, alleging that certain candidates had access to the Local's newpaper, while other candidates were denied that opportunity. The National Vice President reversed the election and ordered a new election. On June 27, 1989, Plaintiff appealed this decision to the National President. The National President denied the appeal on the ground that the Local's newspaper had been used to promote the candidacy of certain officers.

On August 25, 1989, Plaintiff filed a complaint with the Department of Labor, alleging that Title IV of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 401, *et seq.* had been violated. Plaintiff asserted that the National Vice President's order that a remedial election be conducted was politically

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[1] AFGE Local 1617 represents federal employees at Kelly Air Force Base in San Antonio, Texas.

motivated. The Director of the Office of Elections, Trusteeship and International Union Audits (Director) within the Office of the Assistant Secretary, caused an investigation of the complaint to be conducted.

The Director's investigation established that the National Vice President's decision was consistent with the intent of the LMRDA. On November 27, 1989, the Director dismissed the complaint. On December 6, 1989, Plaintiff appealed the dismissal to the Assistant Secretary for Labor-Management Standards. On April 24, 1990, the Assistant Secretary affirmed the dismissal and upheld the AFGE's decision to overturn election.

In September 1989, Plaintiff filed this lawsuit, challenging his removal and suspension from office and the conduct of the remedial election. Plaintiff invoked the LMRDA as the mechanism for remedying the alleged violations. Defendants asserted that Plaintiff's reliance on the LMRDA was misplaced and asserted that the CSRA is the exclusive authority for resolving the dispute. Defendant-Intervenor also asserted that the CSRA governs this matter.

B. THE CSRA APPLIES TO PLAINTIFF'S CLAIMS

Plaintiff's dispute arises from his removal as President of Local 1617 and the remedial election of Local 1617 officers.

Title VII of the Federal Labor-Management Relations Statute is the controlling authority for resolving issues involving labor relations in the public sector. *Karahalios v. National Federation of Federal Employees, Local 1263,*

___ U.S. ___, 109 S. Ct. 1282, 1285 (1989). The statute establishes that

> [i]t is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.

5 U.S.C. § 7101(b). Thus, the Court must ascertain whether Plaintiff is an employee of the Federal Government and whether his claim involves rights and obligations covered by the statute.

The statute defines "employee" as an "individual employed in an agency." 5 U.S.C. § 7103(a)(2)(A). The term "agency" includes an "executive agency." 5 U.S.C. § 7103(a)(3). The term "executive agency" incorporates the Department of Defense. 5 U.S.C. § 101. Plaintiff has been employed by the Department of the Air Force at Kelly Air Force Base in San Antonio, Texas since 1954. As an "individual employed in an agency," Plaintiff is an "employee" of the Federal Government. 5 U.S.C. § 7103(a)(2).

The next issue is whether Plaintiff's Complaint involves rights and obligations covered by the statute. Plaintiff alleges impropriety in his removal and suspension from office and the AFGE's handling of the protests lodged against his re-election as president. The relevant statutory provision mandates that "an agency shall only accord recognition to a labor organization that is free from corrupt influences and influences opposed to basic

democratic principles." 5 U.S.C. § 7120(a). Such a labor organization must be

> subject to governing requirements adopted by the organization or by a national or international labor organization or federation of labor organizations with which it is affiliated, or in which it participates, containing explicit and detailed provisions to which it subscribes calling for –
>
> (1) the maintenance of democratic procedures and practices including provisions for periodic elections to be conducted subject to recognized safeguards and provisions defining and securing the right of individual members to participate in the affairs of the organization, to receive fair and equal treatment under the governing rules of the organization, and to receive fair process in disciplinary proceedings. . . .

5 U.S.C. § 7120(a).

Under the CSRA, " 'labor organization' means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment, ... " 5 U.S.C. § 7103(a)(4). Both the AFGE and Local 1617 are composed in whole or in part of federal employees and have as a purpose the dealing with federal agencies concerning grievances and conditions of employment. Therefore, because both the AFGE and Local 1617 are labor organizations, they are subject to the statute.

The next issue is whether Plaintiff's allegations state a claim under the statute. In his Complaint, Plaintiff

complains of unfairness in the proceedings that resulted in his removal and suspension from union office. If true, this assertion would state a violation of the "fair process in disciplinary proceedings." 5 U.S.C. § 7120(a). Plaintiff also alleges impropriety in the reversal of the February 8, 1989 election. The CSRA mandates "periodic elections to be conducted subject to recognized safeguards." 5 U.S.C. § 7120(a). Thus, the Court finds that Plaintiff's claims are covered by 5 U.S.C. § 7120.

C. THE CSRA CONTAINS THE EXCLUSIVE REMEDY FOR PLAINTIFF'S CLAIMS

The Court, finding that the CSRA applies to Plaintiff's claims, is compelled to dismiss Plaintiff's Complaint as the CSRA's comprehensive statutory scheme precludes judicial review of the Plaintiff's claims. *Karahalios v. National Federation of Federal Employees, Local 1263*, 109 S. Ct. 1282, 1286 (1989).

IT IS SO ORDERED.

Signed this 29 day of March 1991.

/s/ Emilio M. Garza
EMILIO M. GARZA
United States District Judge

(3)

No. 92-1640

Supreme Court, U.S.
FILED
JUN 1 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, ET AL., PETITIONERS

v.

RAMIRO MARTINEZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a federal district court has jurisdiction under the Labor-Management Reporting and Disclosure Act over a federal employee's claims involving his right to union office, where the union admits members who are employed in both the public and private sector.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1640

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, ET AL., PETITIONERS

v.

RAMIRO MARTINEZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 980 F.2d 1039. The opinion of the district court (Pet. App. 9a-13a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1993. The petition for a writ of certiorari was filed on April 12, 1993. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1.a. The Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 401 *et seq.*, was Congress's first major attempt to regulate the internal affairs of labor unions. See generally *Local No. 82, Furniture & Piano Moving* v. *Crowley*, 467 U.S. 526 (1984). The Act defines covered "[l]abor organization[s]" as organizations in an industry affecting commerce in which employees participate and which deal with "employers" concerning terms and conditions of employment. 29 U.S.C. 402(i). The Act expressly excludes from its definition of employer "the United States or any corporation wholly owned by the Government of the United States or any State or political subdivision thereof." 29 U.S.C. 402(e). Consistent with the statutory definitions, Department of Labor regulations provide that a union is outside the LMRDA's scope only if it represents solely government workers and does not deal with a private employer concerning the terms and conditions of employment. See 29 C.F.R. 451.3(a)(4).

Title I of the LMRDA provides union members with an extensive "bill of rights" guaranteeing to each member equal rights to vote and otherwise participate in union decisions, freedom from unreasonable restrictions on speech and assembly, and procedural safeguards against improper discipline. See 29 U.S.C. 411. Title I rights are enforceable by private actions brought by union members against labor organizations in federal district court. 29 U.S.C. 412.

Title IV of the Act is concerned with the election of officers of labor organizations. It requires periodic election of union officers and prescribes minimum

standards to ensure that such elections are fairly conducted. See 29 U.S.C. 481. Title IV enforcement authority resides with the Secretary of Labor: a union member, after exhausting (or pursuing for three months) available internal union remedies, may file a complaint with the Secretary challenging an election. 29 U.S.C. 482(a). The Secretary then must investigate the complaint and, if he finds probable cause to believe that a violation has occurred, file suit in federal district court seeking a new election. See 29 U.S.C. 482(b). With only one exception not applicable here, see 29 U.S.C. 481(c), there is no provision for a private cause of action under Title IV.

b. The Civil Service Reform Act of 1978 (CSRA) comprehensively overhauled the federal civil service system. Title VII of the CSRA, also known as the Federal Service Labor-Management Relations Act, 5 U.S.C. 7101 *et seq.*, governs federal sector labor-management relations, including the activities of recognized labor organizations. Title VII covers "labor organization[s]" "composed in whole or in part of employees, in which employees participate and pay dues," and which deal with federal agencies concerning grievances and conditions of employment. 5 U.S.C. 7103(a)(4); see also 5 U.S.C. 7103(a)(2) (definition of employee), 7103(a)(3) (definition of agency).

Section 7120 of Title VII permits government agencies to recognize labor organizations only if they hold periodic elections subject to prescribed safeguards, and if they assure that their members will have the right to participate in the affairs of the union and will receive fair and equal treatment under its governing rules and fair process in disciplinary proceedings. 5 U.S.C. 7120(a). The Act authorizes

the Department of Labor's Assistant Secretary for Labor-Management Standards to prescribe regulations implementing those standards of conduct, and provides that such regulations shall conform generally to principles applied in the private sector. 5 U.S.C. 7120(d).[1] Accordingly, the Assistant Secretary has promulgated a bill of rights for union members that is virtually identical to the bill of rights in Title I of the LMRDA. 29 C.F.R. 458.2. He also has specified that periodic elections shall be conducted in a "fair and democratic manner" and shall be governed by the election provisions of Title IV of the LMRDA to the extent relevant. 29 C.F.R. 458.29.

Although the substantive provisions of 5 U.S.C. 7120 and its accompanying regulations parallel the LMRDA's provisions, the forum for enforcement is different. *Local 1219, AFGE* v. *Donovan*, 683 F.2d 511, 515 n.13 (D.C. Cir. 1982). Complaints with respect to any violation of 5 U.S.C. 7120—including both "bill of rights" and election violations—are to be filed with the Assistant Secretary. 5 U.S.C. 7120(d). Upon receiving a complaint, the Department conducts an investigation; if there is merit to the allegation, the case proceeds to a hearing before an administrative law judge (ALJ). 29 C.F.R. 458.54-458.57, 458.63-458.66. The ALJ is authorized to recommend a decision to the Assistant Secretary who, if he sustains the complaint, is empowered to order the labor organization to cease and desist from the

[1] As of November 1, 1992, the responsibilities of the Assistant Secretary for Labor-Management Standards under 5 U.S.C. 7120 were transferred to the Department of Labor's Assistant Secretary for Employment Standards. See 57 Fed. Reg. 53,514, 53,516 (1992).

violation and to take other appropriate remedial action. 29 C.F.R. 458.88, 458.91. If a labor organization refuses to comply with the order, the Assistant Secretary may apply to the Federal Labor Relations Authority (FLRA) for enforcement of the order. 29 C.F.R. 458.92; 5 C.F.R. Pt. 2428 (FLRA regulations). Orders of the FLRA are reviewable in the courts of appeals. 5 U.S.C. 7123.

In cases in which the investigation shows that the complaint lacks merit, the Department dismisses the case without referring it to an ALJ for a hearing. 29 C.F.R. 458.58, 458.64(b). The complainant may obtain review of such a dismissal before the Assistant Secretary. 29 C.F.R. 458.59, 458.64(c).

2. Petitioners are the American Federation of Government Employees (AFGE), two of its national officers, and the presidents of three local AFGE unions. Pet App. 4a. AFGE is a federation of more than 1,000 local labor organizations that represent almost 700,000 employees. Pet. App. 2a. The parties stipulated that some of those locals represent private sector employees. Local 1617, an AFGE affiliate, is the exclusive bargaining representative for federal employees in recognized bargaining units at Kelly Air Force Base in San Antonio, Texas; Local 1617 does not represent any private sector employees. *Ibid.*

Respondent Ramiro M. Martinez, a federal employee, was the President of Local 1617 when the events underlying this action began. On January 3, 1989, petitioner Peterson, then AFGE National Vice President, ordered an investigation of a complaint that Martinez had sold a list of Local 1617 members' names and addresses to an insurance company. Pet.

App. 3a. On March 28, 1989, based on the results of that investigation, petitioner Sturdivant, the AFGE President, found probable cause to believe that respondent had accepted money in exchange for the membership list. Sturdivant determined that a fair and impartial trial could not be conducted by Local 1617, and he therefore appointed a trial committee composed of the presidents of three other AFGE locals. *Id.* at 2a-3a.

After a hearing, the trial committee found that respondent had accepted monetary consideration in exchange for the list and that he had not acted in a responsible manner. Pet. App. 10a. The committee therefore concluded that Martinez had violated the union constitution, and it recommended that he be removed from the presidency of Local 1617 and thereafter be barred from any union office for a period of three years. On August 24, 1989, AFGE President Sturdivant accepted the trial committee's findings and recommendations and ordered Martinez's immediate removal and three-year debarment. *Id.* at 3a.

In the interim, on February 8, 1989, Local 1617 held its regularly scheduled election of officers, and Martinez was reelected as local president. Pet. App. 3a, 10a. Shortly thereafter, six unsuccessful candidates for office in that election filed protests with the Local 1617 Election Committee, alleging that certain candidates were afforded access to Local 1617's newspaper, while others were denied that opportunity. The Election Committee dismissed the protests, and two candidates filed appeals with AFGE Vice President Peterson, who initiated an investigation of the election. Based on the results of the investigation, Peterson ordered a new election. *Id.* at 3a. AFGE

President Sturdivant denied Martinez's appeal of that decision. *Id.* at 10a.

On August 25, 1989, Martinez and other Local 1617 officers filed a complaint with the Department of Labor, contending that AFGE's decision to overturn the February 1989 election and to order a new election was arbitrary and capricious and politically motivated, and thereby violated the right of Local 1617's membership to elect their officers. Pet. App. 3a, 10a. The complaint did not challenge AFGE's decision to remove and debar respondent from office.

The Department of Labor conducted an investigation under its CSRA regulations to determine whether Local 1617's election violated 29 C.F.R. 458.29, which, as noted above, requires federal-sector union elections to conform to the substantive requirements of Title IV of the LMRDA. Pet. App. 10a. The Department's investigative findings were consistent with AFGE's determination that union funds had been applied to enhance the incumbent officers' candidacy, and the Department therefore dismissed the complaint. See 29 C.F.R. 458.64(b). The Assistant Secretary, on April 24, 1990, affirmed the dismissal and upheld AFGE's decision to overturn the local election. Pet. App. 10a.

4. Meanwhile, on September 7, 1989, while his CSRA administrative complaint was pending, Martinez filed this action against petitioners under Title I of the LMRDA, 29 U.S.C. 412. Pet. App. 4a. He alleged, *inter alia*, that petitioners violated the Act by removing him from local union office, by barring him from any office for three years, and by invalidating the February 1989 election. *Id.* at 3a.

Petitioners moved to dismiss, arguing that the district court lacked jurisdiction under Section 102 of the LMRDA, 29 U.S.C. 412, over Martinez's claims because they related to a federal sector union and thus must be adjudicated under the administrative scheme provided by Title VII of the CSRA. The Acting Assistant Secretary intervened in the suit and moved to dismiss on the same ground. Pet. App. 4a-5a.

The district court granted the motions to dismiss. Pet. App. 9a-13a. Because Title VII of the CSRA is "the controlling authority for resolving issues involving labor relations in the public sector," the court found the relevant question to be "whether [Martinez] is an employee of the Federal Government and whether his claim involves rights and obligations covered by th[at] statute." Pet. App. 11a. The court held that Martinez is a federal government employee because he is an "individual employed in an agency," 5 U.S.C. 7103(a)(2)(A)—*i.e.*, in the Department of the Air Force at Kelly Air Force Base. Pet. App. 11a. The court further determined that AFGE and Local 1617 are "labor organizations" covered by the CSRA, see 5 U.S.C. 7103(a)(4), because they are composed in whole or part of federal employees and they deal with federal agencies concerning grievances and conditions of employment. Pet. App. 13a.

The court next held that Martinez's complaint involved rights and obligations covered by the CSRA, because his allegation that AFGE unfairly removed and barred him from union office stated a violation of the requirement in 5 U.S.C. 7120(a) that labor organizations provide "fair process in disciplinary proceedings." Pet. App. 13a. The court similarly ruled that

Martinez's allegations of impropriety in AFGE's nullification of the February 8, 1989, election stated a violation of 5 U.S.C. 7120(a)'s mandate that labor organizations conduct "periodic elections * * * subject to recognized safeguards." Pet. App. 13a. Ruling that the CSRA applies to Martinez's claims, the court concluded that it was "compelled to dismiss [Martinez's] Complaint as the CSRA's comprehensive statutory scheme precludes judicial review of the [p]laintiff's claims. *Karahalios* v. *National Federation of Federal Employees, Local 1263*, 109 S. Ct. 1282, 1286 (1989)." Pet. App. 13a.

5. The court of appeals reversed and remanded, Pet. App. 1a-8a, holding that the LMRDA definitional provisions control the jurisdictional question. While noting that there is some "overlap" between the CSRA and the LMRDA, *id.* at 4a n.1, the court concluded that the question in this case "is not whether the CSRA provides a remedy, but whether the LMRDA provides one." *Id.* at 5a n.2. On that issue, the court reasoned that the LMRDA grants federal courts jurisdiction over disputes between a union and its members if the union is a "labor organization" within the meaning of the LMRDA. Pet. App. 2a, 5a-6a (citing 29 U.S.C. 411, 412).[2] The LMRDA defines a "labor organization" as any organization of employees that deals with a statutory "employer" regarding specified subjects, 29 U.S.C. 402(i), and an "employer" includes any employer except the United States or a State or political

[2] The court of appeals observed that it was undisputed that at least some of the rights asserted by Martinez—the rights to vote and otherwise to participate in union affairs—are protected by the LMRDA. Pet. App. 6a.

subdivision of a State, 29 U.S.C. 402(e). The court concluded that a union is therefore covered by the LMRDA if it deals with employers other than governmental bodies, even if it also deals with governmental employers. Pet. App. 6a-7a.

The court noted that in this case, AFGE had stipulated that in addition to representing federal employees, it also "represented" employees of private sector employers. Pet. App. 7a. The stipulation was unclear, however, as to whether AFGE "deal[t] with" private sector employers "concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment," 29 U.S.C. 402(i), which is necessary for AFGE to be a "labor organization" under the LMRDA. See Pet. App. 7a. The court of appeals therefore remanded the case to the district court with instructions to determine whether AFGE "dealt with" private sector employers concerning those topics. If it did, the court of appeals instructed, the case should proceed; if not, the district court should dismiss the complaint. *Ibid.*

The court noted that, unlike the national AFGE, Local 1617 is excluded from coverage under the LMRDA because it is an organization composed solely of federal government employees. Pet. App. 6a n.3. The court concluded that that exclusion was irrelevant, however, because AFGE is the sole union defendant in the case and its actions are the subject of the suit. *Ibid.* In addition, the court explained that under its holding a federal employee may sue under the LMRDA only if his union happens to deal with private employers concerning terms and conditions of employment. *Id.* at 8a. That holding, the court reasoned, merely ensures that all members of a

national union, whether in the private sector or in government employment, have the same rights with respect to that union. *Ibid.*

ARGUMENT

The court of appeals' interlocutory holding that Martinez's claims arising out of his removal from union office may be cognizable under the Labor-Management Reporting and Disclosure Act does not conflict with any decision of this Court or any court of appeals. Review by this Court therefore is unwarranted.

1. The court of appeals held that the district court has jurisdiction under the LMRDA if AFGE deals with private sector employers (as well as federal agencies) concerning the terms and conditions of its members' employment. In so ruling, the court of appeals correctly recognized the general LMRDA principle that a "mixed union"—one that represents both government and private employees—falls within the scope of the LMRDA's coverage provisions.[3] That

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[3] See *Berardi* v. *Swanson Memorial Lodge No. 48*, 920 F.2d 198, 201 (3d Cir. 1990); *Hawaii Gov't Employees Ass'n, Local 152* v. *Martoche*, 915 F.2d 718, 720 (D.C. Cir. 1990); *Hester* v. *International Union of Operating Eng'rs*, 818 F.2d 1537, 1541-1543 (11th Cir. 1987) (per curiam), reaff'd after remand, 878 F.2d 1309 (1989), cert. denied, 494 U.S. 1079 (1990); *Donovan* v. *CSEA Local Union 1000, AFSCME*, 784 F.2d 98, 100 (2d Cir.), cert. denied, 479 U.S. 817 (1986); *New Jersey County & Mun. Council #61* v. *AFSCME*, 478 F.2d 1156, 1157-1158 (3d Cir.), cert. denied, 414 U.S. 975 (1973); *Laity* v. *Beatty*, 766 F. Supp. 92, 98 (W.D.N.Y. 1991), aff'd, 956 F.2d 1160 (2d Cir. 1992) (table); *Kennedy* v. *Metropolitan Suburban Bus Auth.*, 102 L.R.R.M. (BNA) 2088, 2091 (E.D.N.Y. 1979); *NEA* v. *Marshall*, 100 L.R.R.M.(BNA) 2565 (D.D.C. 1979). Cf. *Local 1498, AFGE* v. *AFGE*, 522 F.2d 486, 489-490 (3d Cir. 1975) (national

principle flows, as the court of appeals explained, Pet. App. 6a-7a, from a plain reading of the LMRDA's definitional provisions. The LMRDA defines a labor organization by reference to the employers with which it deals. By defining the term "employer" to include any private sector employer, the LMRDA excludes only those unions that deal exclusively with governmental employers. See 29 U.S.C. 402(e), (i); 29 C.F.R. 451.3(a)(4).[4]

Before the court of appeals, the Assistant Secretary argued that, even though AFGE is a defendant, the case should be resolved under the CSRA because Martinez's claims related primarily to the affairs of Local 1617, a labor organization that is composed exclusively of federal employees and that deals only with a federal agency in representing those employees. For example, Martinez's election charges related to the overturning of the *local* union election.[5]

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union that limits its membership to, and represents only, federal government employees is excluded from LMRDA coverage); *Wright* v. *Baltimore Teachers Union*, 369 F. Supp. 848, 850-855 (D. Md. 1974) (a union that represents government employees exclusively is not covered by the LMRDA).

[4] In *Hester* v. *International Union of Operating Engineers*, the Eleventh Circuit correctly recognized that the LMRDA's definitions do not focus on the employer of the complaining employee, but rather on whether the defendant labor union deals with a covered employer on behalf of any member. See 818 F.2d at 1542. If a union is subject to the LMRDA because it deals with a private employer, "all members, whether employed by the private or public sector, are protected by the Act's bill of rights." *Id.* at n.13.

[5] For this reason, the Assistant Secretary treated Martinez's election complaint as stating a complaint under the CSRA. See p. 7, *supra*. Even if his election claim is cognizable

Similarly, his claims relating to his discipline for misconduct primarily focused on his removal from *local* union office and on the fact that local union members were deprived of the elected officer of their choice. Because those claims arise out of the affairs of a "purely federal" local union, it seemed reasonable to review those claims under the CSRA, which was intended to create a comprehensive scheme to regulate labor-management relations in the federal sector. See generally *Karahalios* v. *National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527 (1989); *United States* v. *Fausto*, 484 U.S. 439, 443 (1988).

The Assistant Secretary also noted below (see C.A. Br. 19-20 n.10), however, that to the extent that Martinez's complaint could be read as asserting a denial of his rights as a member of the *national* union —as is true of his challenge to his debarment from office in the national union—the district court would have jurisdiction over the suit under the LMRDA. That is so because AFGE had stipulated that it represented both government and non-government employees, and thus was subject to the LMRDA.

In ruling that the district court has jurisdiction under the LMRDA if AFGE deals with private sector employers, the court of appeals disagreed with the government's characterization of Martinez's claims as relating primarily to the local union. It instead viewed this case as implicating his rights with

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under the LMRDA, however, it cannot be asserted in this Title I suit because "the exclusivity provision included in § 403 of Title IV [29 U.S.C. 483] plainly bars Title I relief when an individual union member challenges the validity of an election that has already been completed." *Local No. 82* v. *Crowley*, 467 U.S. at 541.

respect to the national union. See Pet. App. 6a n.3 (although respondent is a member of a purely federal local union, that does not "affect his rights under the LMRDA *as a member of the AFGE*") (emphasis added); *id.* at 8a (court of appeals' decision will ensure that "all members," both federal and private sector employees, "have the *same rights vis-a-vis their national union*") (emphasis added). Because Martinez did suffer a loss of national rights as a result of the discipline AFGE imposed on him, the court of appeals' view is reasonable. As the court of appeals recognized, however, an action against Local 1617 would be "an entirely different case," Pet. App. 6a n.3, because such an action arises exclusively under the CSRA. The court of appeals thus recognized CSRA jurisdiction over unions composed entirely of federal employees, and therefore respected the congressional intent underlying the CSRA.

Petitioners argue (Pet. 16) that the CSRA impliedly repealed the LMRDA to the extent that the LMRDA authorizes claims by a federal employee against mixed unions. That argument assumes, of course, that the CSRA applies to claims against mixed unions in the first place, a proposition contrary to the view of the Department of Labor. See *Laity* v. *Beatty*, *supra*, 766 F. Supp. at 96-97.

In any event, petitioners' argument founders on the principle that implied repeals are disfavored and will be recognized only when there is a clear repugnancy between the two statutes. See *Watt* v. *Alaska*, 451 U.S. 259, 266 (1981). Rather, courts should strive where "'there are two acts upon the same subject * * * to give effect to both if possible.'" *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974) (citation

omitted). Here, the LMRDA definitional provisions and implementing regulations expressly include mixed unions, and both the text and purposes of the CSRA can reasonably be construed in a manner that accommodates the LMRDA's coverage of mixed unions. In the context of a national "mixed union" and a purely federal local union, consistency between the two Acts can be achieved, as the Assistant Secretary argued below, by providing for claims by federal local members against the national to be resolved under the CSRA when the gravamen of the claim relates to the local's affairs and the member's rights under the local organization. When, however, the claim relates primarily to the rights of the member vis-a-vis the national organization—as the court of appeals viewed Martinez's claims—it should be decided under the LMRDA. That approach recognizes that in enacting the CSRA, Congress focused on the unique circumstances in the federal sector and manifested no intent to affect the rights of private sector employees. See 5 U.S.C. 7101(b) ("the purpose of this chapter [is] to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government"). It also respects the purpose of the LMRDA to ensure that all members of a union that deals with private employers are entitled to the protections of that Act.[6] See generally *Hester* v.

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[6] AFGE's argument that the CSRA impliedly repealed the LMRDA would lead to one of two anomalous results. If the CSRA impliedly repealed the LMRDA as to federal employees, then claims by a federal employee against a mixed union would be heard under the CSRA, even though the same claims against

International Union of Operating Engineers, 818 F.2d at 1542 & n.12.

2. Neither this Court nor any other court of appeals has addressed the relationship between Title VII of the CSRA and the LMRDA in this setting. Moreover, the only district court to consider LMRDA jurisdiction over a complaint by a federal agency employee against a "mixed" union has ruled, like the court of appeals here, that jurisdiction is conferred by the LMRDA. *Laity*, 766 F. Supp. at 97-98. Finally, every court to address the LMRDA jurisdictional provisions in the context of state and municipal employees has concluded that the LMRDA applies to unions consisting of both private sector and governmental employees. See note 3, *supra*. Thus, the decision below does not conflict with any decision of this Court or of any other court.

Petitioners cite (Pet. 7-11) a number of decisions of this Court and the courts of appeals that emphasize the exclusivity of the CSRA scheme in matters of federal employment. As explained above, however, those decisions do not address rights guaranteed by the LMRDA. In particular, the decisions of this Court upon which petitioners rely do not involve the question whether the CSRA takes precedence over an express cause of action under another federal statute.

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the same union by a fellow member who is a private sector employee would be heard under the LMRDA. On the other hand, if the CSRA were deemed impliedly to repeal the LMRDA so as to place mixed "federal/private" unions under exclusive CSRA jurisdiction, private sector employees who were members of such unions would be required to utilize CSRA procedures—a result that would go well outside the focus of the CSRA on federal sector problems.

See *Karahalios*, *supra* (CSRA does not confer on federal employees an implied private right of action against a union for breach of duty of fair representation); *Fausto*, 484 U.S. at 453-454 (absence of provision in CSRA for administrative and judicial review of adverse personnel action alters "implication" of Back Pay Act that Court of Claims is appropriate authority to review agency's personnel determination); *Bush* v. *Lucas*, 462 U.S. 367, 388-390 (1983) (in light of elaborate civil service remedial scheme, Court will not imply cause of action for damages for constitutional tort).[7]

In any event, further review is unwarranted at this time because the court of appeals' jurisdictional ruling is interlocutory. AFGE stipulated that it represented some non-governmental employees. It argued to the court of appeals, however, that even though it admits as members some persons who work in the private sector, it does not "deal with their private employers" and has no contracts with such employers. Pet. App. 7a. The court of appeals remanded the case to the district court to resolve whether AFGE indeed deals "with any private sector

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[7] Petitioners cite *Carter* v. *Gibbs*, 909 F.2d 1452 (Fed. Cir.) (en banc), cert. denied, 498 U.S. 811 (1990), as establishing that "the preemptive effect of the CSRA reaches federal statutes which otherwise expressly authorize suits by federal employees." Pet. 11. In that case, the Federal Circuit held that federal employees could not assert claims for overtime compensation under the Fair Labor Standards Act where their collective bargaining agreement did not exclude those claims from its grievance procedure. The court's holding was based in large measure on a specific provision, 5 U.S.C. 7121(a), pertaining to the exclusivity of grievance procedures that is not applicable in this case. See 909 F.2d at 1455.

employers on behalf of its members concerning the terms and conditions of employment." *Ibid.* Should petitioners establish, as they maintain, that AFGE does not deal with private employers, this LMRDA action will be dismissed for lack of jurisdiction and petitioners will have no need for review by this Court. On the other hand, if AFGE is found to represent private sector employees with respect to their terms and conditions of employment, petitioners may seek review in this Court in due course, based on a more complete record. There is, accordingly, no reason for the Court to depart from its usual practice of declining to review decisions of the courts of appeals at an interlocutory stage of a case. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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